Nos. 91-142 and 91-349

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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TIDEWATER MARINE SERVICE, INC., ET AL., PETITIONERS

*v.*

LLOYD W. AUBRY, JR.,
STATE OF CALIFORNIA LABOR COMMISSIONER, ET AL.

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PACIFIC MERCHANT SHIPPING ASS'N, ET AL., PETITIONERS

*v.*

LLOYD W. AUBRY, JR.,
STATE OF CALIFORNIA LABOR COMMISSIONER, ET AL.

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act prcempts the application of California's overtime compensation laws to certain maritime workers.

2. Whether the application of California's overtime compensation laws to those workers is preempted by the federal law of admiralty, as defined in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), and its progeny.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

### STATEMENT

1. This case involves the intersection of admiralty law, state minimum wage laws, and the Fair Labor Standards Act (FLSA). Under Section 7(a) of the FLSA, 29 U.S.C. 207(a), overtime must generally be paid at one-

and-a-half times the regular rate to employees who work more than 40 hours in a given week. Overtime need not be paid, however, to "seamen." Department of Labor regulations define "seamen" as employees who "work primarily as an aid in the operation of [a] vessel as a means of transportation" (29 C.F.R. 783.33) and "perform[] no substantial amount of work of a different character." 29 C.F.R. 783.31. Other maritime employees who work on vessels fall within the broader admiralty definition of "seamen," see *McDermott Int'l Inc.* v. *Wilander*, 111 S. Ct. 807, 817 (1991), but are not exempt from the overtime compensation requirements of the FLSA.[1]

The FLSA does not completely displace state wage and hour laws. The statute includes a savings clause, 29 U.S.C. 218(a), that preserves state laws that provide greater protection to workers. That clause provides, in pertinent part, that "[n]o provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum work week lower than the maximum workweek established under [the FLSA]." 29 U.S.C. 218(a).

2. This controversy arises out of California's effort to enforce its state overtime compensation requirements with respect to a very narrow class of maritime workers who are all California residents serving on vessels that are not engaged in foreign, intercoastal, or coastwise voyages.[2] All of the employees affected work on vessels that do not travel to ports outside of California.

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[1] The lower courts referred to those employees who fall within the FLSA's definition of seamen as "seamen" and to other employees who satisfy the traditional admiralty definition as "maritime employees." Pet. App. A3, A47-A48. We use the same terminology in this brief, but also use the term "maritime workers" to refer to both categories of employees collectively. (Our citations to "Pet. App." refer to the appendix to the petition in No. 91-142.)

[2] As defined by federal statute, "foreign" voyages are voyages between a port in the United States and a port in a foreign country

a. Clean Seas, a petitioner in No. 91-349, operates two vessels, *Mr. Clean II* and *Mr. Clean III*, which control and clean up oil spills and other environmentally hazardous discharges off the California coast. *Mr. Clean II* is moored at Port San Luis Harbor in California, approximately 90% of the time. *Mr. Clean III* conducts containment and clean-up operations four to ten nautical miles off the California coast, and at other times is tied to a buoy approximately seven miles off the California coast.[3] Pet. App. A5. Employees on *Mr. Clean III* are organized into rotating crews that serve seven days on duty followed by seven days off. While on duty, crewmembers work 12-hour shifts, alternating with 12-hour rest periods.[4] *Id.* at A5-A6 & n.3.

b. The petitioners in No. 91-142, Tidewater Marine Service and Western Boat Operators (collectively Tidewater), operate two vessels that transport cargo and passengers between California ports and off-shore oil platforms. Their crews, like those of Clean Seas, work alternating seven-day periods and 12-hour shifts. Pet. App. A6-A7.

c. In 1987, twelve Clean Seas employees filed claims for unpaid overtime compensation with respondent Aubry, the Labor Commissioner of California. Aubry is responsible for enforcing Wage Orders issued by the California Industrial Welfare Commission. Aubry found that the Clean Seas employees were entitled to overtime pay

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other than Mexico, Canada, or the West Indies (46 U.S.C. 10301 (a)(1)); "coastal" voyages are voyages between ports on the Atlantic and Pacific Oceans (46 U.S.C. 10301(a)(2)); and "coastwise" voyages are voyages between a port in one State and a port in another State (except an adjoining State) (46 U.S.C. 10501).

[3] California's territorial waters extend to a line three miles off the State's coast. The high seas lie beyond that line.

[4] The record does not indicate how the employees of *Mr. Clean II* are organized.

under IWC Wage Order 4-80. The order covers "professional, technical, clerical, mechanical and similar occupations." Pet. App. A7. There does not appear to be any dispute that the order had not previously been applied to maritime workers. The Labor Commissioner nevertheless concluded that the order was applicable, and awarded each employee an average of $45,000 in overtime compensation. *Ibid.*

3. Several trade associations that represent employers in the maritime and oil and gas industries (hereinafter collectively Pacific Merchant)[5] then commenced this action in the United States District Court for the Central District of California, seeking declaratory and injunctive relief against further enforcement of California's overtime pay laws. The complaint alleged, among other things, that those laws are preempted by the FLSA, 29 U.S.C. 201 *et seq.*, and by federal admiralty law. Tidewater intervened in the action after one of its employees filed a claim for $50,000 in unpaid overtime compensation with respondent. Pet. App. A8.

The district court held that the FLSA preempts California's overtime laws as applied to the employees in question. Pet. App. A65.[6] The court reasoned that the FLSA is "a comprehensive, uniform and national system of wage and hour regulation" that "provides maritime employers and employees with a uniform legal standard by which to ascertain their legal rights and obligations." *Id.* at A61. The court added that "common sense sug-

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[5] Those trade associations, Pacific Merchant Shipping Association, American Institute of Merchant Shipping, Offshore Marine Service Association, and Western Oil & Gas Association are petitioners, along with Clean Seas, in No. 91-349.

[6] Portions of the district court's opinion suggest that it may have considered application of state law to employees serving on vessels engaged in coastwise voyages. The court of appeals, however, did not address such employees. Pet. App. A9-A10 & n.5. See also *id.* at A66 n.7 (reserving the question whether maritime employees employed primarily in territorial waters would be subject to state law).

gests that the uniformity of federal admiralty law would be destroyed if the states were permitted to 'add on' to the federal law enacted by Congress." *Id.* at A62.

4. A divided court of appeals reversed. Pet. App. A1-A44. The court declined to resolve issues of state law raised by the parties, but held that application of the California wage and hour laws in issue was not preempted by the FLSA or by federal admiralty law.[7]

a. Petitioners urged the court of appeals to find that Aubry had failed "to comply with state administrative and procedural requirements regarding wage and hour rulemaking and law enforcement." Pet. App. A32. The court declined to resolve these issues, emphasizing that "we are *not* deciding here whether Aubry's actions are valid *as a matter of California administrative and labor law*. Our task is to determine only whether, in this case, federal law preempts California's overtime pay provisions." *Ibid.* The court concluded that petitioners' "challenges to Aubry's action on state law grounds must be directed to the state's agencies and courts." *Ibid.*[8]

b. With respect to the issue of federal preemption, the court found the "general rule on preemption in admiralty" to be "that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system." Pet. App. A26. It held that respondent's actions satisfied both requirements under the very narrow circumstances of this case.

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[7] The United States filed an amicus brief in support of respondents in the Ninth Circuit.

[8] The court also found that it was not required to abstain from considering petitioners' claim for declaratory and injunctive relief against the state proceedings. Pet. App. A33 n.22. Although the court observed that in some circumstances "comity requires that federal courts abstain from considering actions for declaratory and injunctive relief against state proceedings," it concluded that deciding the federal issue would not unduly interfere with those proceedings. *Ibid.*

With respect to the first prong of this test, the court found that "[m]aritime statutes do not apply to maritime employees, like these, who are not on vessels making foreign, intercoastal, or coastwise voyages"; that the FLSA savings clause, 29 U.S.C. 218(a), "specifically allow[s] states to enforce overtime laws more generous than the FLSA";[9] and that there is "no indication that Congress intended that maritime employees not benefit from more generous state wage and hour laws." Pet. App. A27. Thus, the court concluded, "California's attempt to supplement federal law in this case does not present an irreconcilable conflict with the statutory maritime law or with the FLSA; it does not 'contravene the essential purpose expressed by an act of Congress.'" *Ibid.*

The court also concluded that application of California's overtime pay laws "does not unduly disrupt federal admiralty law and, for that reason, is not constitutionally invalid." Pet. App. A35. Balancing "federal and state interests involved in application of the overtime provisions," the court determined "that the balance tips in favor of California in this case." *Id.* at A31-A32. The court determined that "application of the state's overtime law will not disrupt international or interstate commerce" because the vessels in question operate exclusively off the California coast and their crews consist of California residents. *Id.* at A34.

Judge Copple dissented. He would have held "that state laws mandating overtime pay are preempted by federal admiralty law" and by the FLSA. Pet. App. A42.

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[9] The court of appeals rejected the district court's characterization of the savings clause as an impermissible delegation of authority to prescribe maritime law. Rather, the panel stated, the savings clause simply makes clear Congress's "intent not to disturb the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards." Pet. App. A25.

## DISCUSSION

This case presents difficult and novel issues concerning a State's exercise of its traditional powers to regulate the minimum wages of its citizens in the context of maritime employment. Under this Court's cases, the decisive question—under the particular circumstances presented here—is whether the State's assertion of authority impermissibly interferes with the "proper harmony and uniformity" or the "characteristic features" of general maritime law. On the specific facts of this case, we believe that the court of appeals correctly concluded that the State's assertion of authority was not unconstitutional. Furthermore, although this Court may ultimately need to resolve the issues presented, we do not believe that review is necessary at this time. Rather, it would be appropriate to defer judgment on the constitutional question resolved by the court of appeals at least until potentially dispositive state law issues have been addressed by the California state courts.

1. The permissible scope of the States' role in regulating maritime activity has been a recurring issue in this Court. The general principles applicable to this case are, accordingly, well established.

a. Article III extends the judicial power to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. Art. III, § 2, Cl. 1. This jurisdictional grant empowers "the federal courts in their exercise of the admiralty and maritime jurisdiction * * * to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction,' and to continue the development of this law within constitutional limits" and also empowers "Congress to revise and supplement the maritime law within the limits of the Constitution." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959).

It is also firmly established, however, that States retain authority to act on a variety of issues within the scope of federal admiralty jurisdiction. As this Court explained in *Romero*, 358 U.S. at 373-374: "It is true

that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope." Consequently, maritime law has often been "modified or supplemented by state action." *Just* v. *Chambers*, 312 U.S. 383, 388 (1941).[10]

b. In defining the role that state law may properly play in the maritime context, this Court has made clear that state law may be preempted in either of two ways:

*First*, a federal statute has the same preemptive effect in the maritime setting as in any other context. Thus, under this Court's familiar formulation, the federal statute may expressly preempt state law; it may occupy the field to the exclusion of state law; and state laws that are inconsistent with the federal statute or that stand as an obstacle to Congress's objectives are invalid. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978).

*Second*, in the seminal case of *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), this Court recognized a further limitation on state authority in the maritime context. In *Jensen*, a New York dockworker was killed in the course of moving cargo from a vessel engaged in the interstate shipment of goods. His survivors thereafter sought compensation under the New York Workers' Compensation Act. This Court held that the state statute could not be applied to the accident. While recognizing that "general maritime law may be changed, modified, or affected by state legislation * * * to some extent," the Court declared (244 U.S. at 216):

> [N]o such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with

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[10] See, *e.g.*, *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960); *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

> the proper harmony and uniformity of that law in its international and interstate relations.

As *Jensen* made clear, that limitation on state authority is comparable to the one derived from the so-called "dormant Commerce Clause." [11]

c. As the Court's subsequent decisions in the area of workers' compensation reflect, the so-called "*Jensen* line"—between matters governed exclusively by uniform federal maritime law and matters on which States may act—is difficult to discern.[12] The Court has cautioned

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[11] The Court explained in *Jensen* (244 U.S. at 216-217):

> A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation * * * between the States, Congress can alone act upon it and provide the needed regulations." * * * And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved.

See *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. at 443 (noting that state statute may be unconstitutional if "unduly burdensome on maritime activities or interstate commerce"). See also *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981) (the Commerce Clause itself "is 'a limitation upon state power even without congressional implementation'" and "requires that some aspects of trade generally must remain free from interference by the States").

[12] Although *Jensen* could have been read to preclude application of state workers' compensation statutes to any injuries on navigable waters, this Court later held that state law would govern accidents occurring on such waters that were "local matters." *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469, 477 (1922). After a period in which the Court had difficulty in clarifying the scope of that exception to *Jensen*, it then recognized a "twilight zone" in which an injured maritime employee could invoke either state workers' compensation statutes or the federal Longshore and Harbor Workers' Compensation Act. See *Davis* v. *Department of Labor & Indus.*, 317 U.S. 249, 256 (1942); *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962).

against reading *Jensen* too broadly,[13] but it has not retreated from the core principle articulated in that case—that state law may not interfere with the "characteristic features of the general maritime law" or "the proper harmony and uniformity of that law in its international and interstate relations." See, *e.g.*, *Director, Office of Workers' Compensation Programs* v. *Perini North River Assocs.*, 459 U.S. 297, 306 & n.14 (1983); *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 717-719 (1980); *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. at 337-339, 344; *Just* v. *Chambers*, 312 U.S. at 389.[14]

Various forms of state regulation have been upheld under this test. As this Court noted in *Askew*: "State-created liens[,] * * * [s]tate remedies for wrongful death and state statutes providing for the survival of actions[,] * * * [s]tate rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted wtih a rule of maritime law which did not require uniformity." 411 U.S. at 338, quoting *Romero*, 358 U.S. at 373-374.

The import of these decisions is that every attempt by the States to regulate maritime activity must be carefully examined on its own facts. We therefore turn to the question of whether application of state overtime compensation laws to the vessels in issue is foreclosed either because: (1) a federal statute, here the FLSA,

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[13] See *Standard Dredging Corp.* v. *Murphy*, 319 U.S. 306, 309 (1943); *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. at 344.

[14] Cases applying that general principle to specific situations are legion. See 1 S. Friedell, *Benedict on Admiralty* §§ 112-113 (rev. 7th ed. 1992) (collecting cases in which state law has and has not been preempted).

preempts state law; or (2) the application of California's laws to the circumstances of this case unduly interferes with maritime uniformity under *Jensen*.

2. The court of appeals' basic conclusion—that the FLSA does not preempt California's overtime statute—is required by the statutory language itself. That conclusion is also fully consistent with this Court's precedents.[15]

a. The literal language of the FLSA's savings clause, 29 U.S.C. 218(a), forecloses petitioners' claim of statutory preemption. That Section states that "[n]o provision" of the FLSA—a reference broad enough to encompass both the exemption for "seamen" and the Act's overtime provisions as applied to other maritime employees—shall excuse noncompliance with "any * * * State law" establishing higher minimum wages or more generous overtime protection. Congress scarcely could have expressed its intention to preserve state law more clearly. Cf. *Standard Dredging Corp.* v. *Murphy*, 319 U.S. 306, 310 (1943) (rejecting the contention that an exemption from federal Social Security taxes for persons employed "as an officer or member of the crew of a vessel on the navigable waters of the United States" preempted state unemployment insurance taxes).[16]

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[15] In the courts below, petitioner Tidewater also relied on 46 U.S.C. 8104, a provision of the Shipping Act which regulates the maximum number of hours that seamen may work aboard certain United States-documented vessels. 91-142 Pet. 6, 26, 29. Both the district court (Pet. App. A59-A60) and court of appeals (*id.* at A12-A14) concluded that this provision does not preempt state laws requiring overtime pay for those working fewer hours. Neither petition seeks further review of that determination. Similarly, issues concerning federal regulation of the minimum manning requirements to certain commercial vessels are not at issue. State regulation of this issue would present a very different question from the one presented here.

[16] Federal and state courts have uniformly construed 29 U.S.C. 218(a) to preserve state laws from claims that they are preempted

b. This Court's decisions in *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); *Oil Workers Int'l Union* v. *Mobil Oil Corp.*, 426 U.S. 407 (1976); and *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986), do not suggest a different conclusion. In *Knickerbocker Ice*, the Court struck down a federal statute that purported to authorize application of state workers' compensation laws beyond the "*Jensen* line"—*i.e.*, to the area in which this Court had already held that application of state law would interfere unduly with the uniformity of federal maritime law. The savings clause in the FLSA is not subject to challenge on the same basis. It protects state laws from claims that they have been preempted *by the FLSA*; it does not purport to add to the authority States possess to enact maritime law or to protect such laws from *Jensen*-type preemption.

Although somewhat closer to the mark, *Mobil Oil* and *Tallentire* are also distinguishable. In *Mobil Oil*, the Court addressed a provision of the National Labor Relations Act that preserves certain state right-to-work laws. Section 8(a)(3) of that Act, 29 U.S.C. 158(a)(3), generally authorizes agency and union shop agreements, but a savings clause provides that "[n]othing in th[e] [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment *in any State*

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by FLSA exemptions. *Overnight Transp. Co.* v. *Tianti*, 926 F.2d 220, 222 (2d Cir.), cert. denied, 112 S. Ct. 170 (1991); *Pony Pettis Moving Co.* v. *Roberts*, 784 F.2d 439, 441 (2d Cir. 1986); *Maccabees Mut. Life Ins. Co.* v. *Perez-Rosado*, 641 F.2d 45, 46-47 (1st Cir. 1981); *Central Delivery Serv.* v. *Burch*, 355 F. Supp. 954, 958 (D. Md. 1973), aff'd mem., 486 F.2d 1399 (4th Cir. 1973); *Williams* v. *W.M.A. Transit Co.*, 472 F.2d 1258, 1261 (D.C. Cir. 1972); *Skyline Homes, Inc.* v. *Department of Indus. Relations*, 211 Cal. Rptr. 792, 799 (Ct. App. 1985); *Webster* v. *Bechtel, Inc.*, 621 P.2d 890, 896-900 (Alaska 1980); *Plouffe* v. *Farm & Ranch Equipment Co.*, 570 P.2d 1106, 1109 (Mont. 1977); *State* v. *Comfort Cab Co.*, 286 A.2d 742, 746-748 (N.J. Super. Ct. App. Div. 1972).

*or Territory in which such execution or application is prohibited by State or Territorial Law*," 29 U.S.C. 164(b) (emphasis added). In keeping with the highlighted phrase, this Court determined that the savings clause preserved state law only within certain territorial limits. Specifically, the Court held that "predominant job situs is the controlling factor in determining whether * * * a State can apply its right-to-work laws to a given employment relationship" and, accordingly, that no State could apply its right-to-work laws to employees who spent most of their time working on the high seas. 426 U.S. at 420.[17] There is no language in the FLSA's savings clause that places any comparable territorial limit on the state law it preserves. To the contrary, the FLSA provision protects "any * * * State law" providing minimum wages

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[17] In reaching that conclusion, the Court relied on several factors: (1) the fact that the savings clause, like the provision authorizing agency shop agreements, focuses on "*post*-hiring conditions of employment," which by their nature center on the job situs (426 U.S. at 417); (2) legislative history indicating that the validity of agency shop agreements was to be determined "under the laws of any State in which they are to be performed," presumably the job situs (*id.* at 418); and (3) two "practical considerations"—the propriety of "minimiz[ing] the possibility of patently anomalous extra-territorial applications of any given State's right-to-work laws" (*ibid.*) and promoting predictability regarding the legality of agency shop agreements (*id.* at 419). None of those factors was tied to the maritime character of the employment at issue.

In fact, the majority in *Mobil Oil* declined to adopt Justice Powell's suggestion, which parallels petitioners' position here, that the employees' status as seamen should be decisive. See 426 U.S. at 421 (Powell, Jr., concurring in the judgment) (urging that the NLRA savings clause should not apply to "employment contracts of maritime workers whose job situs is the high seas and who thereby enjoy a special status"). The Court also made clear that it was "creat[ing] no 'exemption' from § 14(b) for the maritime industry." *Id.* at 420 n.12.

Far from supporting petitioners' position, therefore, *Mobil Oil* indicates that a savings clause that is capable of applying in both the land-based and maritime settings should have the same basic effect in both contexts.

or overtime above the floor set by the FLSA, thereby preserving those laws to the fullest extent permissible.

*Tallentire* construed Section 7 of the Death On the High Seas Act (DOHSA), 46 U.S.C. 767, as a "jurisdictional savings clause" preserving the jurisdiction of the state courts over actions under that statute, as opposed to "a guarantee of the applicability of state substantive law to wrongful deaths on the high seas." 477 U.S. at 232. The Court chose from among those two alternatives on the basis of a detailed review of the drafting history of that Section in light of the maritime law prevailing at the time of its enactment. *Id.* at 220-233. In the course of this analysis, the Court found support for its choice in the "prevailing 'uniformity' doctrine" recognized by *Jensen*. See *id.* at 227. The Court did not suggest that a savings clause must invariably be construed to preclude application of state law in the maritime setting, and the FLSA's savings clause cannot be construed in a manner analogous to Section 7. Consequently, *Tallentire* does not support petitioners' position.

3. Because the FLSA neither adds to nor detracts from the authority States otherwise possess to apply their overtime laws to maritime workers, the issue of *Jensen* interference must be addressed. As set forth above, *Jensen* requires preemption if application of California's statute to the workers at issue here "works material prejudice to the characteristic features of the general maritime law" or "interferes with the proper harmony and uniformity of that law in its international and interstate relations." 244 U.S. at 216; *Just* v. *Chambers*, 312 U.S. at 388 n.7, 389. The *Jensen* test is defined at such a high level of generality, however, that it provides very little guidance for determining when a State has exceeded its constitutional authority to regulate conduct. We are nevertheless persuaded—based on the precedents that have applied *Jensen*—that the court of appeals correctly concluded that the State's assertion of authority was constitutional on the specific facts of this case.

a. The Ninth Circuit's resolution of the *Jensen* issue derives strong support from several considerations. First, it is not clear that application of the State's overtime compensation rules to vessels that do not engage in interstate or foreign commerce disrupts the "uniformity" of maritime law "in its international and interstate relations." *Jensen*, 244 U.S. at 216. *Jensen* itself involved application of state law to the owner of a vessel engaged in *interstate* transportation of goods. The court of appeals' holding in this case is in fact limited to vessels whose significant contacts are all exclusively with California—*i.e.*, to vessels that "do not engage in foreign, intercoastal, or coastwise voyages." Pet. App. A9-A10 n.5. See also *id.* at A30-A37 (same).[18] Further, the employment relationship has strong ties to California. The employees at issue are all California residents who were hired in California, receive paychecks at California addresses, and pay California taxes. *Id.* at A7, A32, A34-A35, A37.

We recognize that the vessels in issue are not engaged in wholly "intrastate" activities because their operations are conducted at least in part on the high seas off the California coast. It seems to be more germane to this prong of the *Jensen* inquiry, however, that the vessels are not travelling to other state and foreign ports, where concerns of "uniformity" and conflicting legal requirements are more likely to come into play. Cf. *Miles* v.

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[18] The court expressly reserved the question whether respondent is "preempted by federal law from applying California's overtime pay laws to maritime employees employed primarily on the high seas on *coastwise* vessels engaged in *coastwise* voyages." Pet. App. A9-A10 n.5. It should be noted that some interstate and foreign voyages fall outside the definitions of "coastwise," "coastal," and "foreign" voyages—for instance, voyages between adjoining States, or between a State and Canada or Mexico. See note 2, *supra*. The court of appeals' reasoning, however, suggests that its holding would not reach vessels engaged in any interstate or foreign voyages. See *id.* at A34 (noting that application of State's law would not disrupt "international or interstate commerce").

*Apex Marine Corp.*, 111 S. Ct. 317 (1991) (declining to adopt a rule of maritime law governing wrongful death actions that would distinguish between territorial waters and the high seas).

Second, it is not apparent that a uniform rule governing overtime pay is the kind of "characteristic feature[] of the general maritime law" (*Jensen*, 244 U.S. at 216) that precludes state law supplementation. As the cases cited by petitioners indicate (91-349 Pet. 11-12), admiralty courts have generally enforced the parties' bargain with respect to overtime, regardless of whether that bargain precluded or required overtime pay. Although petitioners emphasize that 12-hour shifts are standard in the industry, California does not prohibit that practice.

Finally, as the court of appeals correctly observed, States have a keen interest in protecting the welfare of their citizens through the adoption of overtime compensation laws. See *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937) (upholding the States' constitutional authority to impose minimum wage requirements as an exercise of the police power). A State may refrain from regulating employment in the maritime industry for a variety of compelling reasons, but its underlying interest in protecting the wages of its citizens who work on board vessels is no different than its interest in protecting its citizens who work in factories.

b. That being said, there is, we believe, considerable force to petitioners' arguments that state law should not apply to their operations. The interest in the uniformity of maritime law has retained the greatest force with respect to "suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews." *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. at 344. In terms of their effect on vessels and their crews, overtime compensation laws are in many respects similar to the workers' compensation law at issue in *Jensen* itself, and the state statute of frauds that this Court held could not bar a seaman from recovering dam-

ages under an oral contract with a vessel owner in *Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961).

This Court has nevertheless permitted some state regulation of the relationship between the vessel and its crew. In *Standard Dredging Co.* v. *Murphy*, 319 U.S. 306 (1943), the Court found that application of a state unemployment insurance statute to vessels employing seamen off the coast of New York was not "destructive of admiralty uniformity." *Id.* at 309. The Court found that *Jensen* invalidated a State's efforts to provide workers' compensation remedies because they "interfered with the existing admiralty system of relief," *ibid.*, but that no similar argument could be made with respect to the imposition of taxes on vessels to provide unemployment compensation for workers. Similarly, *Kossick* can be read to mean only that the state law of contracts should not be invoked to directly prohibit a method of contracting—the use of oral agreements—that had been widely used in maritime commerce.

In contrast, California's overtime compensation requirement simply imposes a financial burden on the vessel owner as a nondiscriminatory exercise of the State's police power in furtherance of the public welfare of its citizens. See, *Kossick*, 365 U.S. at 741 (emphasizing that the statute of frauds was a rule of contract law, not a "public regulation"). Requiring overtime compensation, as in *Murphy*, does not directly interfere with any rule of admiralty law or prohibit any method of contracting or navigating.[19]

We also recognize that application of state overtime statutes on the high seas is more likely to lead to the possibility for conflicts among state laws. See *Tallentire*, 477 U.S. at 213-214 (describing the consequences of efforts to apply state wrongful death statutes in that setting). When a State seeks to assert jurisdiction over a vessel based upon such factors as the residence of the

[19] A state law imposing a maximum number of hours per shift would, in our view, pose a greater potential for direct interference.

members of the crew or contacts between the vessel and a State (rather than the vessel's exclusive presence in its territorial waters), the potential that more than one State will be in a position to assert such an interest is not difficult to envision. Although the court of appeals identified facts in this case that made such conflicts unlikely, the mobility of vessels, their potential for multiple uses, and the turnover in their crews may make those limitations hard to enforce in later cases. For these reasons, there is considerable force to the point that application of state overtime laws *could* lead to undue interference with the essential uniformity of federal maritime law.

4. States have seldom sought to regulate activities on the high seas and, to our knowledge, have never sought to regulate the overtime compensation of seamen and maritime employees. Although it is difficult to resolve the constitutionality of such state regulation under the imprecise standard adopted in *Jensen*, we do not believe that review of respondent's action is necessary at this time. In our view, several factors counsel in favor of deferring consideration of this question.

First, the state courts have not yet had an opportunity to consider petitioners' claims that the wage order in issue cannot properly be applied to maritime workers under state labor and administrative law. It does not appear that these claims are frivolous. As petitioners point out, the express terms of the wage order appear to be directed at "land-based" occupations, 91-142 Pet. 7; 91-349 Pet. 9; the order has never previously been applied to maritime workers, *ibid.*; the wage order was adopted by a separate agency, the Industrial Welfare Commission, after public rulemaking, 91-142 Pet. 7 n.9; and respondent's extension of the order to maritime workers was made without any period for notice and comment.[20] Petitioners have ac-

[20] Even the California Labor Commissioner has expressed uncertainty as to the category of maritime workers he will seek to protect under the law. Br. in Opp. 8, 12-14 (questioning whether, in

cordingly asserted that respondent failed to "comply with state administrative and procedural requirements regarding wage and hour ru'emaking and law enforcement," Pet. App. A32; yet these claims have not been resolved because petitioners' challenges to the state administrative proceedings have been stayed pending the outcome of this case. Br. in Opp. 7.

This is not to suggest that in applying these regulations to petitioners' operations respondent exceeded his administrative authority. We suggest, more modestly, that the Court may wish to decline to consider whether respondent's actions were unconstitutional until after the state courts have had an opportunity to determine whether they were proper under state law. If the state courts conclude that respondent exceeded his authority under state labor or administrative law, then the constitutional issue will obviously be rendered moot.

Second, we are persuaded that the decision's potential for immediate disruption of maritime commerce is not sufficient to outweigh these countervailing prudential considerations. There is apparently no dispute that the issue is "novel," and that no other State has sought to apply its overtime compensation laws to maritime workers. Pet. App. A46; 91-142 Pet. 5 n.3. The vessel owners therefore cannot presently claim that they are being subjected to conflicting state law requirements. The Ninth Circuit in fact minimized the potential for such conflict by expressly limiting its decision to application of California's overtime rule to vessels that do not make interstate or foreign voyages.

Third, and relatedly, the Ninth Circuit is the first court of appeals to consider the issue presented. As a result, there is no disharmony, as yet, in the body of federal law. In addition, the analysis required by *Jensen* depends heavily on the nature of the burdens the state requirement imposes on maritime commerce. Consideration of the

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light of the court of appeals' limitations on relief, petitioners' "anticipated problems" with the ruling will ever arrive).

question might therefore be more informed after a greater opportunity for the courts to evaluate the practical impact of the specific regulatory efforts in issue. All in all, further review can appropriately wait for another day.[21]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[21] Principles of issue preclusion and stare decisis will limit the ability of some parties to relitigate this constitutional question in California. It would not appear likely, however, that further consideration of the issue will be totally foreclosed in future proceedings. Parties with proper standing who were not represented in this case could raise the constitutional question in state court proceedings. A judgment of the California court on the constitutional issue would then be subject to review on certiorari. Further, the issue would also be subject to review again in federal proceedings if respondent seeks to enforce the overtime laws to other vessels that present materially different facts.

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